

The respondent requests review of this decision alleging claimant's ongoing complaints of low back pain pre-dated her employment with respondent. Additionally, based upon claimant's medical records, respondent asserts claimant's present need for treatment is attributable to a non-work related condition. Respondent also alleges claimant failed to provide timely notice as required by K.S.A. 44-520. Accordingly, the ALJ's Order should be reversed.

Claimant argues the ALJ's preliminary hearing Order should be affirmed in all respects. Claimant contends the medical reports establish that her work activities caused or contributed to her present condition. Moreover, claimant maintains she not only advised her manager of her back complaints in January 2005, but that she established "just cause" for extending the notice period to 75 days as provided by K.S.A. 44-520. Thus, the ALJ appropriately granted her claim for benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Since December 2002 claimant has been employed as the assistant manager of respondent's shoe department. This job requires her to assist customers along with stocking shelves with merchandise. In January 2005, claimant was required to handle a larger than normal number of shipments. According to her, she had to "break down" 3 pallets of merchandise a day, distributing the goods to the individual departments and restocking the shoes for sale. As a result of these activities, claimant testified that she began to experience low back pain that progressively increased over time.

Claimant testified that she would go to work and complain to her manager, Marge Zogelman, that she could barely walk and that as a result of her pain, she would wobble like a pregnant lady while walking.¹ When asked at the preliminary hearing precisely what she told Ms. Zogelman, claimant testified that she told Ms. Zogelman "Marge, my back is killing me. These shipments have been so drastic this month."² She also testified that on another date she told Marge "the month had been ridiculously overloaded with shipment, and my back was hurting."³ These conversations took place sometime during January 2005.

Claimant continued to work during January 2005, last working on January 26, 2005. On that evening, she spent the night at her mother's house due to a power outage. On January 27, 2005 claimant woke up with low back pain and found she could not walk. Her mother contacted Dr. Robert L. Eyster and claimant was seen that day.

Dr. Eyster's office note indicates claimant was complaining of low back pain referring into her hips that had existed for the past 2 weeks. His note also indicates this pain has been present before and that claimant reported no known injury. He recommended conservative treatment and if those efforts failed to relieve her symptoms,

¹ P.H. Trans. at 6

² *Id.* at 24.

³ *Id.* at 33.

he recommended an MRI. The records make no mention of work as an aggravating factor on this date. Claimant says she told Dr. Eyster she slept in a strange bed the night before, but this assertion is not reflected in the note.

When claimant's complaints did not subside she returned to see Dr. Eyster on February 3, 2005. He recommended an MRI, which when completed, revealed a "large disc herniation at L4-5".⁴ After discussing the possibility of surgery, claimant and Dr. Eyster elected to pursue conservative treatment with epidural injections and physical therapy along with medication.

Claimant testified that she first learned her back complaints were work-related while taking physical therapy. Up until that time, claimant indicates she had no suspicion that her complaints were work-related because she "is not a doctor."⁵ She says that the physical therapists asked her what she did at work and based upon that inquiry, she learned that work was the source of her pain. According to claimant, this revelation occurred in the last week of April 2005.

Claimant goes on to testify that in late April she contacted Teri Oltman, the store manager, that her job caused her back complaints. In response, Ms. Oltman gave claimant the corporate telephone number. In the first week of May 2005, claimant contacted the corporate office and apparently relayed her complaints. The matter was referred to the insurance carrier who ultimately denied the claim.

Dr. Eyster has opined that claimant's work activities caused her herniated disc as claimant explained that her work unloading the shipments required her to do an increased amount of forward bending and lifting.⁶ Based upon this history, he concluded that she has a "legitimate claim".⁷

In addition to seeing Dr. Eyster, claimant was also seeking treatment with Dr. Norris, her private physician. Dr. Norris directed claimant's physical therapy efforts and although her records do not reflect this finding, claimant says Dr. Norris told her in late March 2005 that her back complaints were due to "overuse".⁸

⁴ *Id.*, Ex. 2 at 3 (office note dated Feb. 8, 2005).

⁵ *Id.* at 18

⁶ *Id.*, Ex. 1 at 10 (letter dated Jun. 14, 2005).

⁷ *Id.*, Ex. 2 at 1 (office note June 14, 2005)

⁸ *Id.* at 20.

Because she was unable to work, claimant filed for and received short term disability. Those forms do not attribute her complaints to work, but do disclose a chronic low back pain condition although the radiating pain and numbness which she now experiences is new since January 2005.

Following a preliminary hearing, the ALJ granted claimant's request for payment of the outstanding bills to Dr. Eyster and her request for ongoing treatment with Dr. Eyster. The ALJ found -

1. Claimant has established that it is more probably true than not true, that she was injured while working for [r]espondent, and that her injury arose out of and in the course of her employment.⁹

In explaining her finding, she wrote -

2. Claimant testified that her work load significantly increased during the month of January of 2005. The increased work load caused [c]laimant's back to hurt, and [c]laimant complained to her manager several times about the amount of work and her painful back.¹⁰

The respondent takes issue with this finding. Claimant has acknowledged a pre-existing history of chronic low back pain and she has a history of waking up with significant back pain dating back to 2002. More importantly, respondent maintains claimant failed to provide any of the physicians she has seen since January 2005 of the connection between her work activities and her present complaints. Put simply, respondent argues that claimant had the same complaints back in 2002 when she woke up with back pain. Thus, there is no reason to believe that now, in 2005, her work played any part in her present complaints of low back pain.

After considering the record, the Board affirms the ALJ's finding that claimant has established that she was injured while working for respondent and that her injury arose out of and in the course of her employment. Claimant's testimony as to her work activities is uncontroverted and based upon her description of the work, the Board is persuaded that she sustained an accident on January 26, 2005, her last date of work.

The ALJ went on to conclude that "[c]laimant proved proper notice to [r]espondent."¹¹ The ALJ explained -

⁹ ALJ Order (Oct. 10, 2005) at 1.

¹⁰ *Id.*

¹¹ *Id.* at 2.

First, [c]laimant notified her department manager in January that her back was hurting with the increased number of shipments which she had to “break down.” The Court finds that notice was sufficient to alert [r]espondent of the possible work connection. When [c]laimant received confirmation from her medical providers in late March or early April of 2005 that there was a causal connection between her work activity and her back pain, she told her store manager that she believed her back problems were work-related. Claimant has demonstrated just cause for extending the ten (10) day notice requirement to seventy-five (75) days. Thus, the provisions of K.S.A. 44-520 are satisfied.¹²

Respondent argues that claimant failed to establish notice within either the 10 day period or even assuming “just cause” is proven, notice was not given within the 75 day period. Claimant, on the other hand, argues that once she knew her complaints were work-related, she gave notice within this statutory time period and that notice occurred in the last week of April 2005 or at the very latest, June 14, 2005, when Dr. Eyster issued his report attributing her complaints to her work activities.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

If a claimant cannot establish that notice was given within the initial 10 days period, the statute provides that notice may be extended to 75 days from the date of accident if a claimant's failure to notify the respondent under the statute was due to “just cause”. In considering whether just cause exists, the Board has listed several factors which must be considered:

¹² *Id.*

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

The difficulty presented by this case is that claimant's recitation of the events is entirely inconsistent with her contention that she gave notice within 10 days *and* that there is just cause for her to have delayed her notice as much as 75 days. Claimant adamantly maintains she told Marge Zogelman *in January 2005* that her increased work activities were causing her increased back complaints. Unfortunately, Ms. Zogelman did not testify. Had this been the only testimony on the issue of notice, claimant's contention that she provided timely notice within 10 days would likely be understandable. However, claimant's own testimony contradicts these statements.

Although she testified that she told Ms. Zogelman of her back pain and its connection to her work activities, claimant repeatedly testified that she had no "inkling, no suspicion, no idea that this was work related"¹³ until she was questioned by the physical therapists as to her work duties in late April 2005. Moreover, she also testified that it was Dr. Norris who suggested her back complaints were due to overuse and that that disclosure occurred at the end of March 2005. Her brief to the Board indicates that "claimant was not made aware of her condition until February 8, 2005, when Dr. Eyster advised her of the herniated discs. The claimant still wasn't aware at this time as to the cause of her condition."¹⁴ She testified the first time she told respondent that she thought her condition was work related was "towards the very end of April, last week of April".¹⁵

It is inconsistent for claimant to suggest that she repeatedly and explicitly told her manager that her work activities were causing her back complaints (thus establishing timely notice) and to also suggest that she delayed notice because she did not know the source or cause of her injury until either Dr. Norris or the physical therapist or Dr. Eyster told her. The assertion of the one proposition necessarily defeats the other. For this reason, the

¹³ *Id.* at 18.

¹⁴ Claimant's Brief at 2 (filed Nov. 14, 2005).

¹⁵ Respondent's Brief at 9 (filed Nov. 8, 2005).

Board reverses the ALJ's finding with respect to timely notice and concluded that claimant failed to provide either actual notice or "just cause" for extending the notice period for 75 days.

Even assuming "just cause" is established by the facts contained within this record, the Board finds claimant's claim is still barred by K.S.A. 44-520. The period for providing notice can, with "just cause", be extended 75 days from the date of accident. Here, the claimant's accident date is January 26, 2005, her last date of work. Claimant testified that the first date she gave respondent notice of her work-related condition was the last week of April 2005. Counting 75 days from January 26, 2005, claimant would have had to notify respondent on or before April 12, 2005. Claimant says she contacted her store manager in the last week of April 2005. Obviously, this notice is not timely. Thus, even with "just cause" the notice she gave was not timely and for this reason her claim is barred. Accordingly, the ALJ's preliminary hearing Order is reversed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.¹⁶

The parties are urged to include only those records pertinent to the pending issues. Unrelated medical records merely clutter the record.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 10, 2005, is reversed.

IT IS SO ORDERED.

Dated this _____ day of November, 2005.

BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹⁶ K.S.A. 44-534a(a)(2).